

Schena, Cristeen

From: Smaldone, John
Sent: Thursday, February 19, 2015 2:47 PM
To: Schena, Cristeen
Subject: RE: Re: Regional FOIA SOP

Chris,

This SOP looks like it has the content it should, as Gerry indicated in the past. One item to consider. By including the specific cost information, is this information likely to become outdated. If so, you can always amend the SOP later.

As was indicated in the past, please create an approval page and have it signed and dated by the author (you) a reviewer (anyone with knowledge of the process) and the approving official, (most likely your Office Director.)

Thank you for seeking our input and good luck.

John

From: Schena, Cristeen
Sent: Wednesday, February 18, 2015 9:58 AM
To: Smaldone, John
Subject: Re: Regional FOIA SOP
Importance: High

Hi John,

I've just completed updating the Regional FOIA SOP and I was informed that I needed you to 'bless' it for me ☺ A lot of changes have been made since the 2010 version that Gerry Sotolongo approved for me and I need to submit the most updated version to HQ before March 31st.

The SOP itself is 23 pages and there are many samples and attachments that go along with it. All of this which is kept on the FOIA Intranet page (<http://r1-gis-web.r1.epa.gov:9876/oarm/facilities/r1foia.htm>), which will be updated after the SOP is approved in HQ.

In addition to attaching the latest SOP, I'm also attaching the emails I had with Gerry so that you can see what was done before. His approval email was all I needed and then I got the approval page signed and that was it.

If you have any questions just let me know. I appreciate you doing this for me.

Cris

Cristeen L. Schena, Region I FOIA Officer
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617-918-1102 (tel.) - 617-918-0102 (e-fax)
www.epa.gov/ne/foia

U.S. EPA New England
Office of Administration & Resource Management
Region I FOIA Procedures
Standard Operating Procedure

The controlled version of this document is the electronic version viewed on-line only. If this is a printed copy of the document, it is an uncontrolled version and may or may not be the version currently in use.

This document contains direction developed solely to provide internal guidance to U.S. Environmental Protection Agency (EPA) personnel. EPA retains the discretion to adopt approaches that differ from these procedures on a case by case basis. The procedures set forth do not create any rights, substantive or procedural, enforceable at law by a party to litigation with EPA or the United States.

Prepared for: U.S. EPA New England

Prepared by: Cristeen L Schena 2/25/15
Cristeen Schena, Region I FOIA Officer, OARM Date:

Reviewed by: Tim Williamson, Jr 3/19/15
Tim Williamson, Deputy Regional Counsel, ORC Date:

Approved by: Nancy Grantham 3/19/15
Nancy Grantham, Public Affairs Director, OPA Date:



2015 Version



**EPA Region 1
Regional FOIA Standard Operating Procedures**



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REGION I FOIA CONTACTS



FOIA Officer

(& FOIA Coordinator for OARM/ORC/OEME)

Cristeen Schena, 918-1102

OSRR FOIA Coordinator & FOIA Officer Back-up

TBD

OEP FOIA Coordinator

Priscilla Flores, 918-1520

OES FOIA Coordinator

TBD

FOIA Attorney

Jill Metcalf, 918-1088

FOIA RESPONSIBILITIES



FOIA OFFICER

The FOIA Officer will:

- monitor FOIAonline for incoming requests and enter in requests that arrive via email, postal mail or hand delivery;
- search several databases in an effort to determine division assignments (Envirofacts, RCRARep, ECHO, SEMS, etc.);
- send acknowledgement correspondence (via FOIAonline) to those requests submitted via email, postal mail or hand delivery;
- assign the request to the appropriate division FOIA Coordinator(s) via FOIAonline (if the request is assigned to more than one division the FOIA Officer assumes the lead for coordinating the response);
- assign FOIAonline 'tasks' for fee waiver & expedited processing requests to HQ (HQ will make the decision (to grant or deny) and inform the requester and the Regional FOIA Officer);
- change the 'track' in FOIAonline if it is determined that a request cannot be responded to within 20 working days (all requests that can be responded to within 20 days are considered 'simple', any FOIA determined to need more than 20 days to respond is considered 'complex');

DIVISION FOIA COORDINATOR

The Division FOIA Coordinator will:

- receive a 'Case Assignment' e-mail and determine if the request belongs in their division and if so assign it to the appropriate staff for response (if they are not the appropriate division they need to alert the FOIA Officer immediately so that the FOIA can be re-assigned – See [Attachment #19](#));
- find out from the Subject Matter Expert (SME) if there are responsive records and if so, the FOIA Coordinator will then create a folder in *q:/groups/foia* (under their appropriate division) for that request so that the SME can upload the records to that location;
- receive a copy of the 2nd Level Review email from the SME's Section Chief or Branch Chief (which approves the release of the records);
- upload a copy of the review email into the FOIAonline correspondence;
- upload the responsive records from the *q:/groups/foia* folder into the FOIAonline case file;
- draft up a response letter for OD or DOD signature (if OARM is the lead, the coordinator need only close out their FOIAonline task – the response letter will be generated by OARM);
- send the word version of the response letter to the Division Administrative Assistant instructing him/her to please print, obtain OD or DOD signature, date stamp, scan and email the signed letter back to them. Let the Administrative Assistant, or the office designee, know that if the letter is being signed late in the day to date stamp it for the next working day.
- upload all cost information into FOIAonline;
- complete FOIAonline close-out process.

See [Attachment #1](#) for FOIAonline instructions, covering such topics as *Entering New Requests, Creating/Closing Out Tasks, Uploading Responsive Records, etc.*

On occasion a requester may need to be contacted to clarify a request or request assurance of payment. These types of contact need to be documented in writing, usually via e-mail or by using the correspondence feature in FOIAonline. If (clarification) contact is done verbally, a phone log (**Sample B**) or an email (recapping the conversation) should be provided to the appropriate FOIA Coordinator. Payment assurance must always be provided in writing.

SUBJECT MATTER EXPERT (SME)

The SME will:

- provide their FOIA Coordinator with any responsive documentation (electronic format is preferred) by saving the records into the designated *q:/groups/foia* folder.
- send an email to their Section or Branch Chief for 2nd Level Review of the responsive documents (or, for voluminous FOIAs, the SME or assigned attorney should carefully brief the Section Chief or Branch Chief). The email should include a copy of the Case Description or Original Request Letter and should be cc'd to the FOIA Coordinator, OD, DOD and an attorney (if applicable). See [Attachment #3](#) for email examples.
- provide their FOIA Coordinator with cost information (search and/or review time, scanning time (billed at direct costs) and any other costs). *Cost information must be submitted whether or not a bill is applicable.*
- recap (in an email or on the designated form) any verbal contact with requesters. See [Sample B](#) for the telephone tracking log form. *Written contact is strongly encouraged, however, verbal contact is acceptable provided it's documented.*
- inform their FOIA Coordinator, if upon reviewing a request it is determined that another staff person or perhaps another Division should have received the request. See [Attachment #19](#).
- contact the requester, if upon reviewing a request it is determined that it is too broad and needs clarification or that the scope of the request needs to be narrowed in order to respond within 20 days. If the requester can't or won't narrow the scope of their FOIA, the SME is to inform them of a future date that we expect to be able to complete their request.
- inform their FOIA Coordinator of the new due date so that FOIAonline can be updated.

SECTION/BRANCH CHIEF REVIEW

- Section Chief or Branch Chief is emailed by their SME and asked to review the responsive material (or, for voluminous FOIAs, the SME or assigned attorney should carefully brief the Section Chief or Branch Chief).
- Section Chief or Branch Chief conducts review and responds to the email (w/ cc's) and, as necessary, provides heads up to the OD on any potential hot issues, including controversial documents to be released. See [Attachment #4](#) for email examples.

OFFICE DIRECTOR'S ROLE

- After the Section/Branch Chief reviews the documents the Office Director will sign all responses – releases, partial releases, denials & no records.

OTHER NOTES

- 1) When more than one office is assigned to a request the office with the most responsive information will be responsible for signing the response letter.
- 2) Interim Release letters will be handled the same way as regular responses.
- 3) For Clarification, Payment Assurance and Extension letters please contact your FOIA Coordinator.
- 4) **Partial/Whole Denial Responses** - Process is similar to regular responses where EPA has responsive records. The Section Chief or Branch Chief is required to review all releasable records, records that have been redacted, and all non-releasable records. In addition there will be attorney involvement regarding the appropriate FOIA exemptions. The FOIA Coordinator and/or SME may need to create additional folders in the *q:/groups/foia* folder for the different categories of records.
- 5) **Responses w/ No Records** - No Records responses will still need to be cleared by a 2nd Level Reviewer prior to completion. An email to your manager explaining how you came to the conclusion of 'no records' will be necessary. Once a response is received agreeing with the search results a response letter can be drafted for OD/DOD signature.
- 6) **IF YOUR REQUEST REQUIRES AN OUTLOOK EMAIL SEARCH PLEASE NOTIFY YOUR FOIA COORDINATOR IMMEDIATELY.**



MS Outlook Email Search Service



OEI became aware that FOIAs processed during the January 1, 2014, to June 1, 2014, timeframe and involving searches of Outlook emails may have resulted in incomplete results due to Outlook email search constraints.

Until the issues with the Microsoft Outlook search are resolved, OEI, along with OGC, OECA, Regional Counsel, and DOJ, recommend Agency functions, especially those used in support of Freedom of Information Act (FOIA) requests, Congressional inquiries, rulemaking, and litigation that currently entail staff searching Outlook using the search tool provided by Microsoft, discontinue use of the search tool until further notice. While Agency employees may continue to search email within Outlook for routine activities (such as locating an old email(s) in your inbox/outbox, etc.), they need to be aware that a search may not return as comprehensive a set of emails they would expect.

In place of using the Microsoft Outlook search function, OEI has established a temporary “work around” by creating an email search service for critical searches that should be used in support of Freedom of Information Act (FOIA) requests, Congressional inquiries, rulemaking, and litigation for which there is an immediate need of assistance. **Any staff that must search Microsoft Outlook as part of the preparation of materials related to these critical email searches must request this search by contacting their regional service point of contact (SPOC).** For Region 1 the Primary SPOCs are Cris Schena (OARM) & Heather Thompson. Staff will need to provide the following information to the SPOC:

- 1) Title of Search
- 2) Type of Search (for litigation, congressional responses, or FOIA's)
- 3) Search Keywords
- 4) Name/Emails of Custodians
- 5) Search Requester & Contact info (e.g., FOIA Title, FOIA Coordinator Contact and Phone number if applicable)
- 6) Estimated Number of Documents, Response Date and any other relevant info.

Searches conducted in Lotus Notes are not affected by this MS Outlook issue

RESPONSIVE RECORDS



EPA is not required to respond to a "continuing" FOIA request - only documents in existence as of the date EPA receives the request are subject to that request. Note that the 20-day time limit does not run while conferring with the requester for clarification of the request, or for resolution of fee waiver requests or authorization of fees in excess of \$25.00.

EPA is not required to do research for a requester, analyze data, answer written questions, or in any other way create records in order to respond to a request.

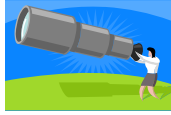
Only Agency records are subject to FOIA, not personal records (such as "memory joggers" not kept in Agency files or telephone messages which do not contain substantive discussion of Agency business). Records in the possession and control of a contractor are not considered Agency records (unless the contractor serves as custodian of the records for EPA and retrieves records at EPA's request). If the records are published by the Federal government, or available through the Government Printing Office or the National Technical Information Service, then the requester can be referred to these other sources. If records originate with another Federal Agency, the request can be referred to that Agency, or there should be consultation with that Agency.



REQUESTED FORMATS



Requesters may ask for records in a specific format. If the requested records already exist in an electronic format, the FOIA requires agencies in almost all cases to provide these records to requesters in that same format, if that is what the requester prefers. If a requester asks for records that exist only in paper form, and would like them in some electronic format, the agency is obligated to provide the records in that electronic format only if it can do so with a reasonable amount of effort. The same is true if an individual requests that electronic records be provided in an electronic format in which they do not already exist.



ADEQUATE SEARCHES

An "adequate search" is required by FOIA, determined by a test of "reasonableness" which may vary from case to case. Responders should ask anyone whom they think may have responsive records to search their files. If some records are maintained by another Region I office (headquarters, etc.), the responder should notify their Division FC (or the FO) to inform them that the request requires additional assignments. The FO will notify the requester, by separate letter, that a portion of the request will be handled by other offices. Do not ask the requester to submit another request.

Providing cost information is another way to show that an 'adequate search' was performed. This will be uploaded into FOIAonline whether it is billable or not and will show how much search and review time was spent, along with the time it took to converse with other staff or with the requester directly, etc.

PARTIAL OR FULL DENIAL RESPONSE LETTERS (Samples J & K)



Be sure to include, in these types of response letters, the following:

- an itemized list of the withheld documents which contains the document title, date, author and addressee, subject matter, and citation to and description of the applicable FOIA exemptions for the documents (identifying the privilege being invoked for any withholding under Exemption 5); if the list of withheld documents is only 2 or 3 items it may be incorporated into the actual response letter;
- any additional information that may help the requester understand the Agency's denial;
- appeal language; and
- the name and title of the program employee or the attorney recommending denial;
- only Office Directors or their equivalents can sign partial or full denial responses (Note: Office Directors or their equivalents also sign all other responses).

It is crucial to have a complete copy of all of the withheld records because these records must be sent to Headquarters for review if appealed. If the withheld and released records are voluminous, they should be marked clearly for future reference, so that they are accessible for copying if an appeal is filed and they can be maintained for the appropriate period of time. Note that all records must be maintained for five years after any FOIA litigation.

ORC CONSULTATION



Generally, an attorney should be consulted unless the responder is absolutely certain that all the documents are releasable. This could occur where the documents have been released before, or are documents of a kind which are always made available to the public. If the responder is uncertain whether a document is releasable, an attorney who is familiar with the documents must be consulted. Sometimes the lead and participating program responder(s) may need to consult with more than one attorney if different types of documents, for instance, both Water and RCRA documents, are included in the request. The responder(s) and attorney(s) must reach a consensus regarding the decision to withhold or release.



APPEAL LANGUAGE (as of 12/19/08)

Used in partial or full denial responses, no information responses and on some occasions it may be appropriate to include this paragraph even when responsive information is being sent:

You may appeal this _____ [denial, partial denial or response, insert the appropriate term] by addressing your written appeal to the National Freedom of Information Officer U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

or

If you consider this response to be a denial, you may appeal it by addressing your written appeal to the National Freedom of Information Officer U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

or

If you consider **any portion of** this response to be a denial, you may appeal it by addressing your written appeal to the National Freedom of Information Officer U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

FEES & FEE CATEGORIES



EPA is allowed to charge fees to the requesters in order to recover the direct costs of search, duplication, and review of requested records. If the total costs of supplying the requested information are less than \$14, the fees are waived. If the costs exceed \$25, the requester is to be contacted on the actual amount so that they may provide a **written "assurance of payment."** They may also set a cap in giving authorization; if charges will exceed that cap, the assigned individual is to contact the requester to discuss ways to limit the search or to get approval for the full costs. Requesters will be billed when the requested records are sent and have 30 days to remit payment. If the cost exceeds \$250, prepayment may be required.

FOIA Provision, effective December 31, 2008, See [Attachment #20](#): This provision imposes consequences on an agency that does not comply with the FOIA's time limits. In such cases, if the exceptions to the rule are not met, agencies cannot charge requesters search fees. For those requesters who are not charged search fees under the FOIA in any event, i.e. those requesters who qualify as an educational or noncommercial scientific institution, or as a representative of the news media, this provision directs that agencies, cannot charge such requesters duplication fees if the agency fails to meet the FOIA's time limits and the exceptions to the rule are not met.

Fees charged vary with the status or purpose of the requester. Different fees are charged to commercial users, representatives of the news media, educational or noncommercial scientific institutions, and individuals. Fee categories are:

Commercial Use Requester: One who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. **Associated Fees:** Requester is charged for search, review and duplication costs.

Non-Commercial Scientific Institution Requester: An institution that is not operated on a commercial basis as that term is defined above and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular

product or industry. **Associated Fees:** Requester is charged for duplication costs excluding the first 100 pages.

Educational Institution Requester: A preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education and an institution of professional or vocational education, which operates a program or programs of scholarly research. **Associated Fees:** Requester is charged for duplication costs excluding the first 100 pages.

Representative of the News Media: **As part of the OPEN Government Act of 2007, the news media category has been amended as follows:** 'The term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term 'news' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.'

Associated Fees: Requester is charged for duplication costs excluding the first 100 pages.

NOTE: Any request from a media outlet and the response correspondence, should be cc'd to the Office of Public Affairs (Nancy Grantham and Dave Deegan).

All Others: non-profit organizations, citizens, etc. **Associated Fees:** Requester is charged for search time and duplication costs excluding the first two hours of search time and the first 100 pages of duplication.

COST INFORMATION



- Clerical Staff (grades 8 and below): \$4.00 per 15 minutes, \$16.00 per hour
 - Professional Staff (grades 9 - 13): \$7.00 per 15 minutes, \$28.00 per hour
 - Manager's Time* (grades 14 and above): \$10.25 per 15 minutes, \$41.00 per hour
- *(use for manager positions only)

NO FEE CHARGED IF TOTAL IS LESS THAN \$14.00

- Bills totaling between \$14.01 and \$25.00 do not require assurance of payment.

- Bills totaling greater than \$25.00 require a written assurance of payment from the requester before processing.
- Cost information must be provided to FOIA Coordinator's for every request (bill or no bill).
- Please indicate the time spent, the amount expended and in all cases the name of the person(s) who conducted the search and/or review portion of the response.
- While you may not always have billable charges to apply, you should always have administrative ones.
- If you are assigned a 'multiple Division' FOIA. You need to remember that if you have a voluminous response you should take note of the amount of assured payment and notify the lead office before processing any copies. Your amount coupled with possible responsive information from other assigned divisions could exceed the authorized amount and result in a bill.
- Administrative charges are to be figured out in 15-minute increments. These costs **are not billed to the requester.**

FOIA INVOICE
(Sample A)



- The invoice is automatically generated within FOIAonline. Only the following information needs to be added to the invoice comment box during the close-out process:

PAYMENT IS DUE 30 DAYS FROM BILL DATE

FOIA payments can now be made on-line. Please visit www.pay.gov, enter sfo 1.1 in the search field, click on 'EPA Miscellaneous Payments – Cincinnati Finance Center' and complete the required fields. Pay.gov can also be accessed via FOIAonline by clicking the 'Make a Payment' button.

- If one of your charges is 'Other', please explain this charge in the invoice comment box (ex. Certification of Records, direct costs for scanning, etc.).
- A .pdf copy of the invoice and response letter must be **emailed to Cincinnati WITHIN 5 BUSINESS DAYS** (w/ a cc to Gillian Cox in Finance) once the FOIA is complete. The email address for Cincinnati is CINWD_AcctsReceivable@epa.gov.

TIME LIMITS & EXTENSIONS



A response to the FOIA requester is due within 20 working days. EPA regulations allow a responder to take up to an additional 10 working days to respond, for one of the following reasons: (1) There is a need to search for and collect the requested records from other facilities, (2) there is a need to search for and review a voluminous amount of separate records, and (3) there is a need to consult with another Agency. This extension must be made in writing. FOIA Coordinators can send such a letter to the requester. The SME may also telephone the requester to ask if they can narrow the scope of their request in order to respond within the 20 days. If the requester cannot narrow their request the assigned SME is to inform the requester of a future date that they expect to be able to complete the request. They are then to inform their FOIA Coordinator of the new due date so that the appropriate adjustment can be made within FOIAonline.

FOIA Provision, effective December 31, 2008, See [Attachment #21](#): There are two circumstances where tolling (stopping the clock) of the FOIA's twenty working-day response period will be permitted. Agencies will be allowed one catch-all opportunity to seek information from a requester provided it is "reasonable" to do so. Agencies will also be allowed to toll, without numerical limit, the response period if it is necessary to clarify issues regarding fees.



EXEMPTIONS

(taken from 1992 FOIA Manual)

Exemption 1 - Matters of National Defense or Foreign Policy

This exemption authorizes an agency to withhold information concerning national defense or foreign policy.

- i) To qualify under this exemption, the information must fall under the criteria established by Executive Order 12356 (implementing the National Security System) to be classified in the interest of national defense or foreign policy and in fact be properly classified pursuant to procedural and substantive criteria contained in the Executive Order.
- ii) Certain information may be classified or reclassified after EPA has received a request for it under FOIA. Special approvals are required. No EPA document may be classified or reclassified once a request for the document under FOIA or Privacy Act has been received, unless the classification is clearly consistent with Executive Order 12356 and is authorized by the Administrator (see Facilities and Support Services Manual, Volume 4850, Security, Part 2, Document Security, Chapter SCR 2-03, Classification).

- iii) With the Agency's increased involvement in the international arena, it is quite likely that we will have classified records in our possession that are responsive to FOIA requests.

Exemption 2 - Internal Agency Rules

This exemption protects records "related solely to the internal personnel rules and practices of an agency."

- i) Internal matters of a relatively trivial nature for which there is no substantial and legitimate public interest in disclosure are encompassed under this exemption. Examples include: documents governing staff use of parking facilities; statements of policy as to sick leave; and file numbers, routing stamps and other administrative markings. The rationale for such withholdings is to prevent unwarranted administrative burden. As a matter of policy, EPA does not withhold records of a trivial nature, even though such records fall within Exemption 2. Discretionary release of such records is encouraged.
- ii) Exemption 2 also has been interpreted to encompass more substantial internal matters, the disclosure of which would allow circumvention of a statute or agency regulation.

Exemption 3 – Information Exempted by Other Statutes

Under this exemption, information that is specifically exempted from disclosure by another Federal statute, which has been enacted by Congress, is also exempt from disclosure under FOIA.

- i) One example is statements of government witnesses relating to federal criminal prosecutions under the Jencks Act.
- ii) The statute in question must (1) leave no discretion as to the requirement that matters be withheld from the public or (2) establish particular criteria for withholding or refer to particular types of matters to be withheld.
- iii) The Privacy Act is not an Exemption 3 statute. Privacy considerations are covered under Exemption 6 or 7(C).

Exemption 4 - Trade Secrets, Commercial, or Financial Information (Confidential Business Information)

This exemption allows the Agency to withhold trade secrets and commercial or financial information obtained from a person and privileged or confidential. EPA regulations elaborating on Exemption 4 are located at 40 CFR Part 2, Subpart B.

Exemption 5 - Privileged Inter- or Intra-Agency Memoranda

This exemption allows the Agency to withhold from disclosure inter-agency or intra-agency memoranda or letters which fall under one or more of the following privileges:

- the deliberative process privilege;
- the attorney work-product privilege;
- the attorney-client privilege;
- the government commercial information privilege;
- the expert witness report privilege;
- the investigative report privilege; and
- the confidential informant privilege (see also Exemption (b)(7)(D)).

1) **Agency Discretion and Waiver.** Even though a document falls under one of the privileges, the Agency encourages the discretionary release of the document, unless release would significantly harm the Agency decision-making process. All of these privileges may have been waived if the Agency has disclosed the document to third parties.

- Inter- or Intra-Agency Records. Exemption 5 only applies to inter- or intra-agency records.
- Intra-Agency Intra-Agency Records are those transmitted within EPA and include reports prepared by outside consultants at the request of the Agency. Recommendations from State officials to EPA may be considered intra-agency records in limited circumstances when EPA has solicited State comments, has a formal relationship with the State, and the records concern a specific deliberative process. (The Office of General Counsel or Regional Counsel should be consulted in these instances.)

2) **The Privileges under Exemption 5**

- The Deliberative Process Privilege. This privilege incorporates the traditional government privilege against discovery of government documents. The purpose of this privilege is to protect the quality of the Agency's decision-making process (i.e., to protect against premature disclosure of proposed policies before they are adopted), to encourage candid and frank discussions among Agency officials, and to avoid premature disclosure which could mislead the public. NOTE: Former Administrator Ruckelshaus' memorandum of October 3, 1984, addresses the assertion of the deliberative process privilege in litigation and does not cover the assertion of this privilege in FOIA matters.
- Predecisional, Deliberative Documents. Only predecisional, deliberative documents may be withheld. Predecisional, deliberative documents are written prior to the Agency's final decision and usually contain recommendations or express opinions on that decision. These documents typically discuss the pros and cons of the Agency's adoption of one viewpoint or another. In determining whether a document is predecisional, consider the document's language and its place in the Agency's chain of decision-making. Documents written by a subordinate and transmitted to a superior are more likely to be predecisional than those written by a person with final decision-making

authority. (NOTE: As a general rule, action offices must segregate from the record those predecisional and deliberative sections and release the factual portions to the requester.)

- Drafts of Documents are Often Predecisional. They must be part of the decision-making chain and either (1) contain language which discusses or debates the decision being made, or makes recommendations, such as a memorandum from a subordinate to a superior which discusses the effects and pros and cons of the decision: or (2) represent a tentative expression of the Agency's position, as in a draft administrative order or memorandum which is being reviewed prior to the adoption of a final Agency position.
- Factual Portions of Deliberative Process Documents Must Ordinarily be Released. The deliberative process privilege does not allow the withholding of purely factual portions of documents. Purely factual portions of these documents must be released if they can be segregated from the remainder of the document. If the facts themselves reflect the Agency's deliberations or involve some subjective opinion which may be reviewed or evaluated and changed, such factual portions may also be withheld.
- Final and Post-Decisional Documents. Final decision documents and post-decisional documents may not be withheld under the deliberative process privilege. These include post-decisional analyses or explanations of a final decision as well as descriptions of Agency efforts to enforce current Agency policies. Documents lose their predecisional status if they are adopted, either formally or informally, as the Agency's final position on a matter, or if they are specifically incorporated by reference in a final Agency decision. Similarly, the deliberative process privilege does not allow the withholding of "Agency working law," such as guidelines, orders, decisions or interpretations that are used to make decisions affecting the public.
- The Attorney Work-Product Privilege. This privilege allows the withholding of documents prepared by, or at the direction of, an attorney in anticipation of possible litigation (which can include administrative proceedings). Litigation need not have commenced but it must be reasonably contemplated. This means that a specific claim must exist that is likely to lead to litigation. The privilege is still applicable after a legal case has ended or even if it was never begun, as long as the documents were prepared in reasonable contemplation of litigation. Segregable factual materials need not be deleted from attorney work-product documents since the facts are generally intertwined with an attorney's evaluation of the case. The privilege, however, does not extend to purely factual documents, such as witness statements or objective data, unless the documents reflect the results of an attorney's evaluation, or reveal his/her strategy or thought process.
- The Attorney-Client Privilege. This privilege applies to confidential communications between attorney and client. An attorney-client relationship is necessary to invoke this privilege. Such a relationship exists for

communications between an Agency attorney and an Agency employee. The application of this privilege requires that the communications between the parties be of a confidential nature. Unlike the attorney work-product privilege, the availability of the attorney-client privilege is not limited to the context of litigation. The privilege still applies when this information is disseminated within the Agency to persons involved with the matter in question. However, unrestricted distribution within the Agency would preclude the Agency from claiming the privilege.

- The Government Commercial Information Privilege. A privilege is available to the government for information it generates in the process leading up to the award of a contract. This privilege incorporates the language of Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause shown . . . a trade secret or . . . confidential research, development or commercial information" may be protected in discovery in civil litigation. This privilege expires once the contract is awarded or upon withdrawal of the contractual offer. An example of this privilege is cost estimates prepared by the government and used to evaluate the construction proposals of private contractors.
- The Expert Witness Report Privilege. Another privilege that is commonly invoked allows the withholding of records generated by an expert witness.
- The Investigative Report Privilege. This privilege has been applied to protect witness statements in Inspector General investigations.
- The Confidential Informant Statement Privilege. Statements obtained from confidential informants such as statements given to the Inspector General by witnesses who have been granted confidentiality, may be withheld.

Exemption 6 - Personal Privacy

Exemption 6 permits the withholding of all information about individuals in "personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

- 1) Threshold test: The record must be a personnel, medical or similar file. This is a relatively easy test to meet. Personnel and medical files are easily identified. The term "similar file" has been very broadly interpreted to include any information about a particular individual which is identifiable to that individual.
 - The actual label assigned to the file is of no significance. Nor does the information have to be of a highly sensitive or intimate nature.
 - If a record can be sanitized so that the identity of the individual cannot be determined from the record itself, or from the record in conjunction with publicly available information, the record is not a similar file and does not

meet the threshold test for Exemption 6. Accordingly, a sanitized copy of the record should be disclosed.

- 2) Balancing test: Information which meets the threshold test is withholdable under Exemption 6 if the invasion of privacy resulting from disclosure would be clearly unwarranted. To determine this, the individual's privacy interest must be balanced against the public interest in disclosure.

Privacy interest: Encompasses the individual's reasonable expectation of privacy and control over the dissemination of personal information about himself. Individuals have an expectation of privacy with respect to information which, by its nature, is personal, embarrassing or otherwise injurious to the individual. Privacy interests also include the right to be free from the secondary effects of disclosure such as harassment or unwanted intrusions even if the information itself is not inherently harmful.

- Individuals may have a privacy interest in information which is publicly available, e.g., marital status or home address, but there is no privacy interest in information which is very well known and clearly in the public domain.
- Businesses and other entities do not have privacy rights.

Public interest: There is a public interest in a particular Agency record if disclosure of that record sheds light on the operations or activities of the government. The interest is that of the general public in knowing what its Government is doing. The FOIA requester's identity, personal motives or interests (including commercial interests) in seeking the information are not relevant to the issue of public interest and must not be considered in determining if a public interest exists.

Balancing process: First, determine if the individual has any privacy interest in the information. If there is none, the information must be released even if there is no public interest. Second, if there is a privacy interest, determine whether any public interest in the information exists. If both privacy and public interests exist, the competing interests must be weighed against each other and the stronger interest prevails. If the privacy interest outweighs the public interest, the information is exempt under Exemption 6 and may not be released in the Agency's discretion.

- 3) Glomar: Occasionally a FOIA request is worded in such a way that it would not be possible to deny the record under Exemption 6 without revealing the very information which is protected under the Exemption. For example, drug counseling records maintained by EPA's Employee Counseling and Assistance Program are normally withholdable under Exemption 6. However, if EPA denied a FOIA request for such records in reliance on Exemption 6, the Agency would be revealing the existence of such records, the very information which is protected. To guard against such inadvertent disclosures, the Agency may provide a

"Glomar" response: that is, it would neither confirm nor deny the existence of records in response to all requests for counseling records. The appropriate EPA legal office must be contacted before responding to the FOIA request in any case in which a "Glomar" response might be suitable.

- 4) Law Enforcement Records: Exemption 6 would normally be applicable to protect the personal privacy of individuals named in law enforcement files if there is no countervailing public interest. Exemption 7(C), which protects personal privacy in the law enforcement context, would also be applicable. Since the test for applying Exemption 7(C) is less stringent than that of Exemption 6, consideration should always be given to relying on both exemptions. See discussion of Exemption 7(C).
- 5) Personnel-Related Records on Federal Employees: EPA frequently receives FOIA requests for personnel related information on current and former Agency employees. Federal employees have privacy rights with respect to the personal details of their employment and there is frequently little or no public interest in this information. However, other personnel information on Federal employees is considered available to the public upon request because it has been determined by the courts, the Office of Personnel Management and/or common practice that there is little if any privacy interest in this information. Many records, such as employee applications. (SF 171's) and official personnel folders, contain both exempt and non-exempt information. The following lists describe the types of personnel-related information which is frequently subject to FOIA requests and whether such information is customarily considered exempt or not under Exemption 6.

EXEMPT	NOT EXEMPT
Social Security No.	Name/position/organization *
Home addresses & Telephone No.	Office addresses/ Tel. No. *
Salaries in the Private Sector	Fed./State Gov. salaries (past and present)/ amounts of awards and within grade increases
Evaluations/appraisals	Position descriptions/job standards
Employment/Education data <u>not related</u> to qualifications for Federal employment	Employment/Education data <u>related</u> to qualifications for Federal employment
Identities of unsuccessful applicants for employment or promotion	Identities of successful applicants for employment or promotion
Recommendations for promotions, awards	Approved promotions, awards, including employee grade and step
College grades	

EXEMPT	NOT EXEMPT
Birthdate/Marital status/similar personal or family data Life/health/charity/thrift savings options and withholding data Citizenship Reasons for terminating past employment Leave records	Past Federal/State/Military service and dates of service * * With the exception of certain sensitive positions

Exemption 7 - Records or Information Compiled for Law Enforcement Purposes

In 1986, exemption 7 was amended to apply to all records or information compiled for law enforcement purposes whose release could reasonably be expected to cause the specified harm. Prior to 1986 the exemption applied only to investigatory records whose release would cause the harm each sub-section sought to prevent. Exemption 7 provides that records or information compiled for law enforcement purposes need not be disclosed in six specific instances (discussed below).

- 1) Exemption 7(A): Interference with Enforcement Proceedings. Records or information compiled for law enforcement purposes may be withheld where disclosure "could reasonably be expected to interfere with enforcement proceedings." Harm to the government's case in court by premature release of evidence or information, or damage to the Agency's ability to conduct an investigation, constitutes interference under this exemption. Damage to a related or similar enforcement proceeding also constitutes interference.

Exemption 7(A) can be invoked only as long as the enforcement proceeding is in progress, pending or anticipated. The government must be able to specifically articulate the kind of harm that would affect its case. Some types of harm that fall under this exemption include premature disclosure of the government's evidence and strategy or the focus of its investigation, and the possibility that potential witnesses and sources of information would be inhibited.

The applicability of this exemption need not be justified document by document since some generic categorization of documents is permitted. For instance, acceptable generic categories include "witness statements prior to a hearing," "affidavits and interviews of charging parties," and "correspondence with attorneys and charging parties."

- 2) Exemption 7(B): Deprive a Person of the Right to a Fair Trial. Records or information compiled for law enforcement purposes may also be withheld if their disclosure "would deprive a person of the right to a fair trial or an impartial adjudication." This exemption applies mostly in the criminal trials of individuals.

- 3) Exemption 7(C): Unwarranted Invasion of Personal Privacy. Records or information compiled for law enforcement purposes may be withheld if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The public interest in the disclosure of a document must be balanced against the invasion of privacy that would result from disclosure. Exemption 7(C) is not limited to matters contained in an individual personnel, medical or similar file, but pertains to any personal information compiled for law enforcement purposes.

Courts have recognized the danger of damage to an individual's reputation simply because his or her name is mentioned in a record compiled for law enforcement purposes even though he or she is not charged. Such information may be released only where exceptional interests weigh in favor of disclosure.

Exemption 7(C) is also used to protect the identities of FBI agents and other law enforcement officials who are personally involved in compiling records or information for law enforcement purposes, and to withhold the names of informers who may not technically qualify as confidential sources under Exemption 7(D).

- 4) Exemption 7(D): Disclose Identity of Confidential Source. The first prong of Exemption 7(D) applies to civil law enforcement investigations and permits records and information compiled for law enforcement purposes to be withheld if disclosure "would reveal the identity of the source." The second prong of Exemption 7(D) applies to a criminal law enforcement matter and allows the withholding not only of the identity of the confidential source, but also any information provided by the source. This allows withholding of information provided by a confidential source even if the information was obtainable by other means.

There is no balancing test used in applying this exemption. To receive protection under this Section, the Agency must have given sources an express promise of confidentiality, or there must be circumstances from which assurances of confidentiality reasonably may be inferred.

- 5) Exemption 7(E): Reveal Techniques, Procedures or Guidelines. This exemption permits the withholding of records or information compiled for law enforcement purposes that "would disclose techniques and procedures for law enforcement investigations or prosecution, or would disclose guidelines for law enforcement investigation or prosecution if such disclosure could reasonably be expected to risk circumvention of law." Generally, the technique or procedure should not be known to the public. Those portions of an internal agency enforcement manual or guidelines that would enable the circumvention of the law should be withheld.
- 6) Exemption 7(F) : Endanger Life or Safety of Any Individual. Under this exemption any records or information compiled for law enforcement purposes

may be withheld if disclosure "could reasonably be expected to endanger the life or physical safety of any individual." No balancing test is required.

Exemption 8 - Records of Financial Institutions

This exemption applies to reports prepared for agencies responsible for the regulation or supervision of financial institutions (such as the Federal Reserve Board). It generally does not apply to records in EPA's possession.

Exemption 9 - Geological or Geophysical Information and Data Concerning Wells

This exemption pertains to "geological and geophysical information and data, including maps, concerning wells."

EXCLUSIONS

a. Substantive Guidelines.

- 1) Whenever a request is made which involves access to records described in sub-section (b)(7)(A) and
 - the investigation or procedure involves a possible violation of criminal law; and
 - there is reason to believe that the subject of the investigation is unaware of its pendency and
 - the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the Agency may, only during such time as these circumstances continue, treat the records as not subject to the FOIA requirements.
- 2) Action offices shall also deny the existence of records whenever informant records maintained by the Agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier and the informant's status as an informant has not been officially confirmed.

b. Procedural Guidelines. In situations where it would appear to be appropriate to rely on the exclusion provisions, action offices must consult with the Office of General Counsel, Contracts and General Law Division prior to responding to the request.

It is important to distinguish between the exclusions set forth above and the situation where an agency expressly refuses to confirm or deny the existence of records (i.e., "Glomar") responsive to the FOIA request.

FOIA TELEPHONE TRACKING LOG



Any verbal contact with requesters should be immediately documented and emailed to the appropriate FOIA Coordinator. The email should include the FOIA #, date & time of the call, reason for the call and outcome. If you would prefer to document your call on a form, there is a FOIA Telephone Tracking Log (**See Sample B**).



OUTSIDE VENDORS

- Outside copy vendors are used when responsive FOIA information is voluminous.
- Requesters are informed of the need to use an outside vendor and are given a copy of the vendor list (**See Attachment #8**).
- They are to select a vendor to contact and make the necessary arrangements.
- FOIA Coordinators should instruct requesters to have the vendor they choose contact the FOIA Coordinator to arrange for the pick-up/return of the records. There is a request form available to accompany outgoing records (**See Sample C**).
- Upon receiving the returned materials the FOIA Coordinator may then close-out the request.



SOME OTHER THINGS TO REMEMBER

Multiple Assignment FOIAs: Take note of the amount the requester is willing to spend and know that this amount is to cover information found in all assigned divisions. If you find that you have a billable amount of responsive information please do not make any copies (hardcopy or electronic) or perform any search or review time without checking with your FOIA Coordinator first. Your amount added to those of the other assigned divisions could result in the agency exceeding the cost the requester indicated they would pay. Make sure to point out the 'willing' amount to the SME's.

If a FOIA is assigned to you **in error**, please notify the FOIA Coordinator immediately to ensure the proper reassignment is made. See **Attachment #19**

Agency's Tax Exempt # is: 000026705

FOIAonline Help Desk # is: Toll-Free: 855-246-3642 9 to 5 EST, Monday-Friday, you can also contact them via email by going to:

<https://foiaonline.regulations.gov/foia/action/public/home/emailSupport>.

All 'final determination' responses need to include an original signature.

Signed response letters should be scanned into .pdf format and uploaded into FOIAonline during the close-out process (after the FOIA has been reviewed).